Valmont Industries, Inc. *and* United Steelworkers of America, AFL–CIO, CLC. Case 16–CA–18814

April 30, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On June 22, 1998, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order.

We adopt the judge's finding, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing written corrective actions to employees Edgar Lewis and Michael Sharp for engaging in a brief conversation near Lewis' work station, and by suspending and discharging Lewis for soliciting and talking to leadman Lonny Hutchison.

Regarding the written corrective actions, the credited evidence shows that on July 28, 1997,[2] at 8 a.m., Lewis and Sharp engaged in a conversation lasting between 60 and 90 seconds when Sharp came out of the maintenance shop to borrow a pen from Lewis in order to fill out a maintenance request form. Foreman Sam Gregg, who with leadman Billy Dotson observed the conversation, commented to Dotson about "what we are seeing. Edgar and Michael's being together," and Gregg further admitted that he "speculated" that both Lewis and Sharp supported the Union. Gregg reported to Manufacturing Manager Allen Abney that he had seen Lewis and Sharp talking for a few minutes.[3] On August 1, Lewis was called to Gregg's office where Gregg, Dotson, Abney and Human Resources Manager Roger Bower were also present. Abney confronted Lewis with a litany of unsubstantiated offenses in addition to talking to other employees at his work station during working time, and then issued a written corrective action to Lewis. When Lewis questioned the specific allegations and how he could be given a written counseling since he had not been warned for over 6 months, Abney responded that it was a recurrence of conduct about which Lewis had been counseled the previous November, 8 months before. Abney also informed Lewis that the corrective action constituted not only a written warning but also a final notice and that any further offense would result in termination.

On August 5, Sharp was called to his supervisor's office, where Human Resources Manager Bower issued a corrective action accusing Sharp of loafing and specifying that Sharp was observed leaving his assigned work station. Sharp deduced that the referenced incident was when he borrowed Lewis' pen, and proceeded to explain what had happened. Bower issued the already-prepared warning to Sharp despite Sharp's explanation. That same day Bower looked at the July 28 maintenance request submitted by Sharp, noted that the time on the request was 8 a.m., and reported that to Abney. The following day, Abney requested written statements from Gregg and Dotson, and both reported that Lewis and Sharp were observed at 8:15 a.m. The judge found that the Respondent attempted to create a paper trail designed to discredit Sharp's explanation, instead of genuinely investigating the matter.

Contrary to our dissenting colleague, we agree with the judge, for the reasons set forth by him, that the Respondent issued the warnings to Lewis and Sharp because the Respondent believed that they were engaged in union activity. The credited evidence established that the conversation for which Lewis and Sharp were disciplined was work related and that the Respondent's employees are permitted to engage in work-related conversations. The credited evidence further established that the Respondent suspected that the conversation was related to union activities, that the Respondent failed to conduct a meaningful investigation, and that other employees had not been similarly disciplined for similar alleged misconduct. Under these circumstances, the judge's finding that the warnings issued to Lewis and Sharp were motivated by the Respondent's belief that they were engaged in union activity and that the Respondent failed to establish that it would have issued these warnings in the absence of their suspected union activity is well supported by the record.

Similarly, we adopt the judge's finding, for the reasons set forth by him, that the Respondent's subsequent discharge of Lewis for allegedly violating its no-solicitation rule violated Section 8(a)(3) of the Act. The credited evidence established that Lewis chanced upon Hutchison as Lewis was exiting a restroom, and that they momentarily stopped and engaged in a short conversation regarding whether Hutchison had decided to sign an authorization card. There is no dispute that Lewis was on break, and the evidence is also clear that Hutchison was, at the time of his brief encounter with Lewis, walking back from the breakroom looking for a coworker and thus not working. Under these circumstances, we find

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates are in 1997.

[3] Lewis had served as the Union's election observer a year earlier. The judge credited evidence showing that Abney was concerned that Lewis had continued to engage in soliciting after the October 1996 election and had informally spoken to Lewis in April or May concerning "disrupting employees . . . and soliciting," some three or four months before the incidents here in question.

that the judge was fully warranted in finding that the conversation between Lewis and Hutchison did not constitute a violation of the Respondent's no-solicitation rule; and the Respondent could not reasonably have believed that it did. Since, as noted above, the likelihood of Lewis' engaging in conversation about the Union had previously been the subject of management comment, we infer that the Respondent's discharge of Lewis was motiviated by its hostility to what it believed were his prounion sentiments.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Valmont Industries, Inc., Brenham, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER HURTGEN, dissenting in part.

Contrary to my colleagues, I would not find that the Respondent violated Section 8(a)(3) and (1) by issuing warnings to employees Lewis and Sharp. I would also not find that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging Lewis. In both respects, the General Counsel did not establish a prima facie case.

As recounted by the judge, Lewis and Sharp received warnings in August 1997. The warnings were based on a worktime conversation between Lewis and Sharp, which conversation was observed by Foreman Gregg and Leadman Dotson. Gregg and Dotson thought that Lewis and Sharp were engaged in a personal conversation. It is undisputed that Respondent could discipline the employees for such conduct. Further, even if Gregg and Dotson were wrong in their belief, that would not make the discipline unlawful under the Act. It would simply mean that the discipline was mistaken.[1]

The judge and my colleagues nonetheless conclude that the discipline was discriminatory and therefore unlawful. There is no evidence of animus to support this conclusion. In an effort to establish animus, the judge relied upon the absence of a "meaningful investigation" by Respondent. However, the Act does not compel an employer to have a "meaningful investigation" of suspected misconduct. The Act simply forbids discrimination against protected activity. There is no showing that Respondent typically investigates alleged misconduct and yet failed to investigate the alleged misconduct of Lewis and Sharp.

My colleagues also suggest that there is animus to be found in Gregg's "speculation," at the time of the above incidents, that Lewis and Sharp supported the Union. The assertion has no merit. There is no evidence that Gregg mentioned his "speculation" to Dotson. Nor is there evidence that Gregg's speculation meant that he (Gregg) was hostile to such union activity. Further, the evidence does not establish that Gregg reported the incident because of his speculation. Indeed, there is no evidence that his report even mentioned his speculation.

The allegation concerning the discharge of Lewis is even more clearly nonmeritorious. Lewis was in fact soliciting an employee (Hutchinson) while the latter was on working time. Thus, there was no "mistake" on the part of Respondent.[2]

Further, Respondent's valid rule clearly forbade Lewis' activity.[3] Thus, Respondent's discharge of Lewis for that activity was not unlawful.

Robert G.Levy II, Esq., for the General Counsel.
Roger J. Miller, Esq., for the Respondent.
Douglas P. Fennell, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Brenham, Texas, on February 11 and 12, 1998. The charge was filed August 5, 1997,[1] and was amended on August 15, 22, and 27. The complaint issued on October 30. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act by engaging in surveillance of employees' union activities and violated Section 8(a)(3) of the Act by issuing warnings to four employees and by suspending and discharging one employee because of their protected activities.[2] Respondent's answer denies any violation of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Valmont Industries, Inc., a corporation, is engaged in the manufacture of steel poles at its facility in Brenham, Texas, from which it annually sells and ships products valued in excess of $50,000 directly to points located outside the State of Texas. The Respondent admits, and I conclude and find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I conclude and find, that United Steelworkers of America, AFL–CIO, CLC, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

[1] This is not a case where an employer mistakenly believes that misconduct occurred in the context of protected activity (e.g,. a strike). In such a case, the mistaken belief is no defense. See *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

[2] My colleagues say that Hutchinson "was not working." The issue, however, is whether he was on working time. As to that issue, it is clear that his break was over.

[3] The Respondent's rule states: "Solicitation by employees on their working time or *on the working time of any employee solicited is prohibited."* [Emphasis added.]

[1] All dates are 1997 unless otherwise indicated.

[2] An allegation that Respondent created the impression of surveillance was withdrawn at the conclusion of the General Counsel's case.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Union engaged in an unsuccessful organizational campaign among Respondent's employees in 1996, losing a Board-conducted election. The Union again engaged in organizational activity among Respondent's employees in 1997. The unfair labor practices alleged in the complaint occurred prior to the filing, on September 4, of the petition for an election in connection with this campaign.[3]

Following the Union's 1996 organizational campaign, in February 1997, Respondent published a rule relating to solicitation and distribution. Roger Caldwell, Respondent's general manager, explained that the rule was published "because we needed to have control of solicitation on the property for all sorts of purposes." He acknowledged that organizational activity was one of those purposes. The published rule reads as follows:

> Distribution of literature during the working time of any employee involved is prohibited. Working time does not include breaks or meal times. Distribution of literature is also prohibited in working areas.
>
> Solicitation by employees on their working time or on the working time of any employee solicited is prohibited.

Notwithstanding the clear wording of the foregoing no-solicitation rule, the record reveals confusion on the part of Respondent's management regarding what the rule prohibits. Human Resources Manager Roger Bower testified that Respondent did not permit solicitation in a working area on noworking time, "solicitation cannot be in a working area."

Respondent enforces plant rules pursuant to a policy set out in its corrective action guidelines. The guidelines provide for progressive discipline in the form of a verbal reprimand, written reprimand, final notice, and termination. A written record is made of verbal reprimands issued pursuant to Respondent's corrective action guidelines. The guidelines provide examples of conduct that may result in discipline. Those examples include the offense of "soliciting . . . for any purpose on company property except for charities authorized by the company." The complaint does not allege the promulgation of this rule as a violation of the Act.

B. The Warnings of Lewis and Sharp

1. Facts

Union representatives had stayed in touch with employees who had supported the Union's 1996 campaign. In July, Union Representative Douglas Fennell met with these employees, including Edgar Lewis who had served as an observer for the Union at the 1996 election, in preparation for a 1997 organizational campaign. That organizational campaign began on Thursday, July 31.

On Monday, July 28, employee Michael Sharp, a material handler in the shipping department, took a malfunctioning straddle loader to the maintenance shop for repair. Respondent's manufacturing facility includes four large buildings. The maintenance shop is located at the end of the building that contains the large pole and small pole departments. Upon arriving at the maintenance shop, Sharp discovered that he did not have a pen or pencil with which to complete the maintenance request form. He therefore proceeded into the building, walked down the aisle to the large pole department where his friend Edgar Lewis worked, and requested to borrow a pen. Lewis, not realizing that he had a pen in his pocket, walked to his workbox, which was at the front of the long pole upon which he was working, to obtain a pen. Upon arriving at his workbox, he discovered that he had a pen in his pocket and gave it to Sharp. Sharp completed the maintenance request form, gave the pen back to Lewis, and returned to the maintenance shop where he turned in the maintenance request. On the line designated "signature, date, time," Sharp wrote his name, 7–28–97, and 8 a.m.

The foregoing transaction was observed by Foreman Sam Gregg and Leadman Billy Dotson, both of whom deny seeing Lewis hand anything to Sharp. The conversation between Lewis and Sharp lasted no more than a minute and a half. As Gregg was observing Lewis and Sharp, he commented to Leadman Dotson "[a]bout what we were seeing. Our conversation was about Edgar [Lewis] and Michael Sharp's being together." Gregg admitted that he "speculated" that both Lewis and Sharp supported the Union. Gregg did not seek to curtail the conversation or ascertain the subject of the conversation. He told Manufacturing Manager Allen Abney that he had seen Lewis and Sharp talking for "a few minutes."

Although Gregg reported to Abney that the conversation lasted "a few minutes," he testified that it lasted between 3 and 5 minutes. I find, consistent with the credible testimony of Lewis, that the conversation took between a minute and a minute and a half. Gregg did not time the conversation and did not testify that he looked at his watch. Dotson observed Sharp when he entered the building and walked to where Lewis was working, a distance of over 100 feet.[4] Dotson estimated that Lewis and Sharp talked together for about 30 seconds, at which time he testified that they noticed him and moved to the front of the pole. Although Dotson first testified that they talked for about 4 minutes, he then testified that "the whole thing [took] four minutes." Dotson, like Gregg, did not look at his watch. I find that "the whole thing" began when Dotson first saw Sharp and ended when Sharp returned to the maintenance shop. This is consistent with the credible testimony of Lewis that he and Sharp were together for between a minute and a minute and a half. Neither Gregg nor Dotson timed the conversation. Their interest was, as Gregg testified, in Lewis and Sharp "being together."

On August 1, Lewis was called to Foreman Gregg's office. There he was confronted by Gregg, Human Resources Manager Roger Bower, and Manufacturing Manager Abney. Leadman Dotson was also present. Abney, reading from a corrective action form, told Lewis that he had been wasting companytime by not returning from break on time, talking to other employees at his workstation during working time, leaving his workstation, and distracting other employees. Lewis, responding to the accusations in the order in which Abney had presented them, noted that Leadman Dotson had, the previous Tuesday, cautioned all of the employees in the department to be sure that they got back from break on time. There is no evidence that

[3] The election in Case 16–RC–9969, in which a majority of the valid votes counted were cast against representation, was held was held on October 15. The certification of results issued on December 31.

[4] I credit Sharp's testimony that he came from the maintenance shop. Dotson's testimony that Sharp came from a different direction was not corroborated by Gregg.

Lewis had returned late from break. Regarding speaking to others at his workstation, Lewis asked how he could control other people, and Abney told him to tell them to come back on break. Lewis questioned how he could be given a written counseling since he had not been warned for over 6 months. Abney responded that it was a recurrence of conduct about which Lewis had been counseled previously, on November 27, 1996. Lewis then asked how he could be accused of loafing when his percentage, presumably referring to his production figure, was higher than the majority of those performing similar tasks. Abney did not directly respond. Instead, he repeated that Lewis had been leaving his workstation to talk to other employees and talking with employees who came to his workstation. There is no evidence that Lewis left his workstation. Bower informed Lewis that the corrective action constituted not only a written warning but also a final notice and that any further offense would result in termination.

Although Abney testified that he questioned Lewis as to whether he had a conversation with Sharp at his workstation, I do not credit that testimony. Lewis credibly denied that Sharp's name was mentioned. I also do not credit Abney's uncorroborated testimony that Lewis acknowledged having a conversation with Sharp. Bower does not corroborate this, stating that Lewis neither confirmed nor denied having a conversation. The corrective action form from which Abney was reading makes no mention of Sharp or a conversation allegedly lasting an excessive amount of time on July 28. It is undisputed that Abney did not ask Lewis whether the conversation in which he had engaged was work related.

Manufacturing Manager Abney testified that the corrective action issued to Lewis was prompted by Gregg's verbal report that Lewis and Sharp talked together for "a few minutes," and that, when they noticed that they were being observed, they walked to the opposite end of the pole. Abney did not specifically question Gregg regarding the length of the conversation. The corrective action does not mention this incident and includes matters unrelated to any conduct observed on July 28. Abney consulted with Bower and decided upon a final written notice since he had previously counseled with Lewis regarding "disrupting employees while they [were] working and soliciting." Abney spoke informally with Lewis some three or four months before August with regard to soliciting, but he made no record of that conversation.

On August 5, Sharp was called to the office of his supervisor, David Wunderlich. Glen Rimer, Wunderlich's superior, and Human Resources Manager Bower were also present. Bower began reading from a corrective action designated as a written warning, stating that Sharp had been observed leaving his assigned workstation. Sharp asked who accused him of this, and Bower did not reply. Sharp stated that he thought it was Dotson because he recalled seeing Dotson nearby on the morning he borrowed the pen from Lewis. Sharp explained to Bower that he had taken a straddle loader to maintenance and had gone to Lewis to borrow a pen. He told Bower to talk to his leadman, Fritz Cole, to confirm this, stating that he had given a copy of the maintenance request to Cole after he submitted it. Without further investigation, Bower issued the written warning to Sharp.

Shortly after Bower issued the warning, he went to look at the maintenance request to which Sharp had referred. He noted that the time on the request was 8 a.m. Although Bower testified that he spoke with Gregg and Dotson regarding this incident, neither of them corroborate this testimony. On August 6, the day after Bower looked at the maintenance request, and almost a week after Lewis was warned, Gregg was asked by Abney to write a statement regarding the incident. That report places the time of the incident at 8:15 a.m., after the time shown on the maintenance request.

Gregg testified that Dotson informed him that Abney also had asked him to prepare a statement. I do not credit the testimony of Dotson that he prepared a statement on his own, that he did so the day of the incident, and that he gave it to his supervisor, Gregg, that same day. Gregg did not testify to receiving any such written statement, and, prior to warning Lewis, Abney testified only to receiving an oral report from Gregg, a report given in Dotson's presence. In view of the foregoing, I find that Bower, on August 5, reported to Abney that Sharp had, on July 28, submitted a maintenance request reflecting the time of 8 a.m. Abney, on August 6, requested statements from Gregg and Dotson.

The statements of Gregg and Dotson both report that Lewis and Sharp were observed "at 8:15 a.m." I give no weight to the time recorded upon these statements that Abney obtained. Gregg initially testified that the conversation he observed was "in the morning sometime," that he did not remember the time. He did not testify to looking at his watch when observing Lewis and Sharp. Dotson initially testified that the conversation occurred between 8 and 9 a.m., "I don't know the exact time." He was unable credibly to make his admission that he did not look at his watch compatible with his statement placing the time of the conversation at 8:15 a.m. Respondent did not rely upon these statements when issuing the warnings to Lewis and Sharp. Abney did not obtain the statements until more than a week after the incident and after both warnings had been issued.

Bower, when questioned regarding why he had proceeded to issue the warning to Sharp in view of Sharp's explanation that the conversation with Lewis was work related, testified that "[d]ue to the length of the conversation, I think there still would have been some issues." Bower was then asked, if that were the case, why he bothered to check out the maintenance request to determine whether Sharp needed a writing instrument. Bower responded, "it was a good thing to make sure that we checked that out as best as we could."

Gregg confirmed that employees are permitted to engage in nonwork-related conversations so long as they are not too lengthy. He stated that he would not have reported the conversation if it had only lasted a minute. He did not, at any time, ask either Lewis or Sharp about the subject of their conversation.

Roger Caldwell, Respondent's general manager, acknowledged that employees are permitted to have work-related conversations. Human Relations Manager Bower testified that employees, during working time, may also engage in nonwork-related conversations and that "it would be unreasonable to suggest that . . . [employees are] not going [to] sit there sometime and talk about . . . the weather." According to Bower, nonwork-related conversations are permitted, "as long as . . . it's not a disruption."

Respondent's records, prior to August, reveal no warning to any employee for engaging in a work-related conversation. The only employee warned for engaging in conversations unrelated to work was Rosie McGuire. McGuire had, on February 13, received a verbal warning for being absent from her workstation on February 3, when she was making coffee in the buff-

ing station, and on February 13, when she was on her way to the coffee machine with a coffee filter. Thereafter, despite the verbal warning, she was not again warned until March 26, despite being counseled on February 18 and failing to follow directions to clean up on March 18, when she engaged in two separate conversations with two different employees instead of cleaning up. On March 26 she was issued a written warning after she had, on March 19, again failed to follow directions to clean up and, instead, engaged in two conversations, one at 7:40 and another at 12. Although not appearing in the record, there is reference to a final warning on May 30 in the document terminating McGuire's employment. McGuire was terminated on June 9 after she was, on June 6, observed talking for several minutes on a cellular telephone in the buffing room.

The corrective action issued to Lewis does not have a check mark in any block reflecting the category of his offense. The corrective action issued to Sharp reflects his offense as loafing. Prior to August, two employees, in addition to McGuire, had been warned for loafing, but in each instance, the loafing was coupled with another offense. On February 28, Dwight Henderson was issued a written warning for loafing and insubordination after he had, during the week of February 13, ceased working and cleaned up at 2:30, some 20 minutes ahead of time. No warning was issued at that time. During the week of February 18, Henderson failed to get a crane and put a pole on rollers as his leadman had twice requested. The warning issued on February 28 cites both offenses. On July 14, Calvin Wernecke was verbally warned for loafing and low quality work. The corrective action reflects that Wernecke needed continuous direction and failed to "get with" the leadman for work.

Subsequent to the warnings issued to Lewis and Sharp, two other employees were warned for loafing. On August 29, Bryant Nelson was warned for loafing on August 14 after he had been observed avoiding work throughout the day, including sitting at a picnic table for 10 minutes. On that occasion, he was approached by a leadman. On September 18, William Reichardt was warned after he insubordinately told his leadman that he would not clean up on September 17. That corrective action also reports that Reichardt was observed, on September 16, being out of his work area. When approached by his leadman and asked what he was doing, Reichardt responded "killing time."

2. Analysis and concluding findings

In applying the analytical framework of *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), to the foregoing facts, I find that Respondent was aware that Lewis was engaged in organizational activity on behalf of the Union. I am mindful that there is no direct evidence that Respondent was aware that the Union had begun its 1997 organizational campaign on the day before Lewis was issued a final notice. Such a finding is unnecessary to my decision. Lewis had served as a union observer at the election in 1996. Despite the absence of a current active organizational campaign prior to July 31, Manufacturing Manager Abney was concerned that Lewis had continued to engage in soliciting after the 1996 campaign concluded. Indeed, he informally spoke with him concerning "disrupting employees . . . and soliciting" some three or four months before August 1. On July 28, Gregg commented to Dotson "[a]bout what we were seeing. Our conversation was about Edgar [Lewis] and Michael Sharp's being together."

I further find that Respondent was aware that Sharp supported the Union. Even though it is uncontraverted that Lewis actively supported the Union and served as a union observer at the 1996 election, Foreman Gregg testified that he only "speculated" that Lewis supported the Union. In view of this, his further testimony that he "speculated" that Sharp also supported the Union, confirms Respondent's knowledge of the union sympathies of both employees. This conclusion is confirmed by Gregg's commenting upon seeing Lewis and Sharp "being together." Despite Gregg's curiosity about this transaction, he did not ask either Lewis or Sharp about this conversation that occurred in the department over which he was foreman.

Although the record does not establish an independent violation of Section 8(a)(1) of the Act, animus towards employee union activity is revealed by Respondent's disparate treatment of Lewis and Sharp as well as by its prohibition of solicitation on nonworking time in working areas in derogation of employee Section 7 rights.

The final step of the *Wright Line* analysis requires a determination of whether Respondent's animus was a motivating factor in its decision to warn the employees. A respondent's discriminatory motivation may be established by various factors, including "[e]vidence of suspicious timing, false reasons given in defense[,] and the failure to adequately investigate alleged misconduct . . . ." *The 3E Co.*, 322 NLRB 1058, 1062 (1997). Although the timing of the warning is suspicious, the record does not establish that Respondent was aware that the Union had begun its organizational campaign. Thus, I make no inference from the timing of the warning administered to Lewis 4 days after the alleged offense and to Sharp over a week after the alleged offense. In examining the corrective action issued to Lewis, I note that it accuses Lewis of returning late from breaks and leaving his work area, conduct in which he was not shown to have engaged and which was not a basis for the issuance of the warning. At the hearing, it was established that the only basis for the warning was the conversation at his workstation when he was approached by Sharp. Respondent prepared the warning and administered it to Lewis without giving him any opportunity to explain his conduct. Indeed, even when the warning was administered to him, he was not advised that he had allegedly talked for too long with Sharp. It is undisputed that employees are permitted to engage in work-related conversations. I note that employee Nelson and employee Reichardt, both of whom were warned after Lewis and Sharp, were approached by a leadman and foreman respectively when they appeared to be loafing. In the instant case, Gregg did not seek to discover why Sharp was present in his department or what Sharp and Lewis were talking about. His conversation with Dotson regarding Lewis and Sharp "being together" and his admission that he "speculated" that both supported the Union suggest that he erroneously assumed the conversation was union related rather than work related. The conversation in which Lewis and Sharp engaged was work related. Their mutually corroborative testimony establishes that Sharp asked to borrow a pen. In response to this request, Lewis went to his workbox. This movement, which Dotson characterized as moving away from him, accounts for the failure of Gregg and Dotson to have observed Lewis hand Sharp a pen. Respondent's employees are permitted to engage in work-related conversations. Respondent never asked Lewis about the subject of his conversation with Sharp. Thus, Respondent had no basis for assuming that the conversation was not work related. "The failure to conduct a meaningful investigation or to give the employee an opportunity to explain has been regarded as an important indicia of

discriminatory intent." *K & M Electronics*, 283 NLRB 279, 291 fn. 45 (1987). I find that the General Counsel has established a prima facia case that Lewis was warned because of his support for, and activity on behalf of, the Union.

Unlike Lewis, Sharp was not charged with a litany of offenses. Although the form designates his offense as loafing, the written narrative refers to Sharp leaving his workstation. Even though Bower refused to tell Sharp the name of the individual who had informed him of Sharp's alleged offense, Sharp was able to deduce that Bower was referring to the occasion when he had borrowed a pen from Lewis. Sharp explained what had happened. Bower, who had already prepared the warning, administered it despite this explanation. Bower had conducted no investigation prior to his meeting with Sharp. It was only when he warned Sharp that Bower learned that Sharp had submitted a maintenance request and, therefore, had not improperly left his workstation without authorization. Upon discovering that the maintenance request bore the time of 8 a.m., Respondent attempted to justify the disciplinary action it had already taken by, for the first time, obtaining written statements from Gregg and Dotson. Even if I were to accept the representation on the statements of Gregg and Dotson that they observed Lewis and Sharp at 8:15, any semblance of an investigation would have dictated speaking again with Sharp. The maintenance request form does not specifically designate that the time recorded is the time of submission. Thus, Bower needed to confirm from Sharp that 8 a.m. reflected an actual rather than approximate time and that the time recorded was when Sharp turned in the maintenance request rather than some other time, such as when he left his workstation in order to submit the request. Respondent did not do so. Sharp engaged in a work-related conversation when he borrowed a pen from Lewis in order to complete the maintenance request. Respondent did not seek to ascertain the subject of the conversation or the reason that Sharp was in the large pole department. When Sharp gave a rational explanation for his presence, Respondent, instead of genuinely investigating the matter, created a paper trail that purportedly discredited Sharp's explanation. I find that the General Counsel has established a prima facia case that Respondent's warning of Sharp was motivated by its belief that he, with Lewis, was engaged in union activity.

Respondent has not established that either Lewis or Sharp would have been warned in the absence of their support for the Union. Employees are permitted to engage in work-related conversations. There is no evidence that any employee has ever been warned for loafing when engaging in a work-related conversation. Respondent had no evidence that Lewis, who did not leave his work area, and Sharp had engaged in a nonwork-related conversation. Respondent's brief characterizes the conversation as not work related, but the brief also acknowledges that Respondent never inquired "and still does not know the content of the conversation." If, as Bower asserted on cross-examination, there would still have been "issues" due to the purported length of the conversation, an impartial investigation would have dictated speaking with Lewis and Sharp as well as Gregg and Dotson regarding the length of the conversation. The statement obtained from Dotson does not reflect the length of the conversation. Gregg's statement, although stating that the conversation lasted "a few minutes," thereafter estimates it at from 3 to 5 minutes. The absence of any precision regarding the length of the conversation confirms that Respondent's purpose in obtaining the statements was to refute Sharp's claim that the conversation was work related by purportedly establishing that it occurred after he submitted the maintenance request. Contrary to Respondent's contentions, the credible evidence does not establish that the conversation occurred after submission of the maintenance request. Although the postdiscipline statements from Gregg and Dotson, over a week after the incident, report the incident as occurring at 8:15, neither claims to have noted the time as the conversation was occurring. At the hearing, Gregg was unable to independently place the time, other than "in the morning," and Dotson's attempt to support the time he recorded on his statement was not credible. I find, consistent with the credible testimony of Lewis and Sharp, that they were engaged in a work-related conversation. Respondent has not rebutted General Counsel's prima facia case that Lewis and Sharp would have been warned in the absence of their actual, or "speculated," support for the Union. The record establishes, and I find, that Respondent warned Lewis and Sharp because of their union activity in violation of Section 8(a)(3) of the Act.

Even if I were to assume that Lewis and Sharp engaged in a nonwork-related conversation on July 28, I would still find that Respondent violated the Act. Lewis was not out of his work area, thus he was not distracting other employees, he was being distracted. There is no evidence of any employee being warned for engaging in conversation after being approached by another employee. There is no evidence that the employees whom McGuire approached when she was warned for loafing were warned for responding to her. So far as the record shows, this was the first instance of Sharp being out of his work area. The warnings issued to employees prior to August reveal that discipline was not imposed for a single offense. Employees who received discipline engaged in multiple offenses. McGuire was loafing on three separate occasions after her verbal corrective action before a written corrective action was issued. Henderson, in addition to loafing, was insubordinate, and Wernecke was not producing quality work. Sharp, who Gregg "speculated" supported the Union, was issued a written warning on the first occasion that he allegedly loafed.[5]

C. The Warning of Niemeyer

1. Facts

In August, employee Grady Niemeyer worked as a fitter in the small parts department located in building 2151 on the night shift, from 11 p.m. until 7 a.m. On the morning of August 19, after the night shift ended, Niemeyer hurried outside and distributed union leaflets to his fellow employees as they were leaving building 2151. When all of the employees appeared to have left, Niemeyer reentered the building in order to retrieve a cooler that he had brought to work. As he entered the building, he encountered Johnny Scurry, an employee on his shift, who was standing just inside the building entranceway near the timeclock and bulletin board. Niemeyer did not notice whether Scurry was clocking out or reading the bulletin board. As he passed him he handed him a leaflet. This transaction was observed by Foreman Sam Forman, who was at a desk that is also located in that area, further inside the building than the timeclock. Forman was not working. Forman testified that, after observing Niemeyer outside, he proceeded to update his foreman's report, and "a few moments after that," he noticed Nie-

[5] Sharp had previously received a verbal warning. That warning is not involved in this proceeding, and the record does not reflect the offense Sharp committed.

meyer hand Scurry a leaflet. Thus, Foreman, having finished updating the report, was simply observing what was occurring in the entranceway. Forman told Niemeyer that he could not hand out leaflets "because anywhere inside the building is a work area." Forman testified that he told Niemeyer that he could not hand out leaflets "on the shop floor." This variance in testimony is immaterial in view of Foreman's contention that the building entranceway next to the bulletin board and timeclock constituted part of the shop floor. Niemeyer stated that he did not know there was anything wrong with what he was doing, but he would do it outside the building from then on. On August 22, near the end of the shift, Niemeyer was called to Forman's office where Forman and Bower were present. He was issued an official verbal corrective action. Bower stated to him that he could not distribute literature in a work area. Niemeyer stated that he did not think he was doing anything wrong, that he had not been in a work area.

Respondent's corrective action guidelines state that, prior to a verbal warning being issued pursuant to those guidelines, "[n]ormally a discussion shall take place." There is no evidence that Niemeyer had previously engaged in similar conduct, nor is there any evidence that he had previously been verbally counseled.

The doorway to building 2152, at which the foregoing occurred, opens into an area approximately 15 feet long and 8 feet wide. As a person comes into the building, there is a timeclock on the right wall some 5 or 6 feet inside the door, then a bulletin board, and, beyond the bulletin board, a desk used by foremen. On the left wall there was a vending machine. The vending machine in the entranceway was for the convenience of employees, so that, without going to the breakroom, they could "get something to drink and come back to work."

According to General Manager Roger Caldwell, "Work areas are everything except break areas, lunch rooms, and outside the wall of the plant."

2. Analysis and concluding findings

A respondent's prohibition against distribution of literature in working areas is presumptively valid. The issue in this case is the definition of working area. As the foregoing facts reveal, resolution of this issue is dependent upon a determination of whether the entranceway was a work area. It is clear that it was not a production area. Employees who were coming to or leaving work would be in the entranceway before clocking in and after clocking out. Distribution of union literature at timeclocks is protected except when the timeclock is in a working area. Compare *Nashville Plastic Products*, 313 NLRB 462, 466 (1993), and *Thermo Electric Co., Inc.*, 222 NLRB 358 fn. 2 (1976). I find no basis for any claim that the entranceway constituted a work area. Although Forman was unwilling to characterize employees who stopped work to use the vending machine as being on break, it is obvious that they would not actually be working when operating the vending machine. Thus, I find it difficult to characterize the area immediately adjacent to the vending machine as a work area. The record does not establish the reason that a desk utilized by foremen was placed in the entranceway, on the same side as the timeclock and bulletin board and opposite the vending machine. Although a computer is on the desk, Respondent did not establish how often, or for what purpose, the desk and computer are used. There is no evidence that they were used by employees. At the time he observed Niemeyer, Forman was not working. When an area is used both for work and nonwork activities, it is incumbent upon a respondent to clearly convey to employees what is and is not a working area. Any ambiguity is properly resolved against the party creating the ambiguity. *Laidlaw Transit, Inc.*, 315 NLRB 79, 84 (1994).

Thus, I find that Respondent violated Section 8(a)(3) of the Act by disciplining Niemeyer for distributing literature on nonworking time, after his shift ended, in a nonworking area, the entranceway in which the timeclock was located.

D. The Discharge of Lewis and the Warning of Fontenot

1. Facts

The Respondent provides its day-shift employees with a morning break, a lunch break, and an afternoon break that begins at 1:30. At 1:30 on August 12, Lewis went on break. As he was emerging from the restroom, onto the aisle separating the small pole and large pole departments, he encountered Leadman Lonny Hutchison. Leadmen were included in the unit and voted in the election. Lewis had, at Hutchison's request, previously given him a union authorization card, but Hutchison had not returned a signed card to Lewis. Lewis stopped and addressed Hutchison, stating, "I guess you decided not to sign a card." Hutchison also stopped momentarily and replied that he had not made up his mind which way he was going. Lewis asked him to let him know when he did. Hutchison said, "Okay." They then proceeded in opposite directions.

Ten minutes prior to the end of each shift at Respondent's plant, a horn sounds which signals the beginning of time for clean up. On August 11, Leadman Allen Ray noticed some scrap material in the area where saw operator Laura Fontenot worked. He asked Fontenot about it, and Fontenot advised him that the material had been left there by Leadman Hutchison, who had trained her to operate the saw. Although the material was referred to as scrap, it is sometimes used by employees; thus, Fontenot did not dispose of something that was not hers to dispose of. Ray asked her to get with Hutchison to have him take care of the scrap. On August 12, Fontenot cleaned up after the horn sounded. As she was waiting to leave, she confirmed that Ray wanted her to speak with Hutchison regarding the scrap. Thereafter, she went to the small pole department where she encountered Hutchison standing with some papers in his hand. She asked Hutchison if he wanted the scrap, and he replied that he did, stating that "some guys" wanted to make toolboxes out of it. He stated that he would e-mail Ray to advise him of his desire to keep the scrap. As Fontenot and Hutchison were talking, they were walking toward the aisle that separates the small pole and the long pole departments. As they reached the aisle, immediately after Hutchison stated that he would send an e-mail to Ray, Fontenot asked him if he had signed a union card. He responded, "No." Fontenot said, "Great," and returned to the timeclock.

Hutchison verbally reported the above two incidents to Abney within a day or two after August 12. He testified that he told Abney that he had problems with what he considered harassment by Lewis and Fontenot, "continual repetitive use of trying to get me to sign the union card." Hutchison did not specify what he was doing when Lewis and Fontenot were speaking to him. He reported that both had come into his work area and asked if he had signed a union card.

Abney testified that Hutchison told him that both Lewis and Fontenot came into his work area and asked him if he had signed a union card. He initially testified that Hutchison referred to disruption of employees in the department, but upon

cross-examination acknowledged that the only person that Hutchison identified as being affected was himself.

Abney requested that Hutchison prepare a statement, and he did so. The statement that Hutchison prepared states, in pertinent part, as follows:

> On Tuesday (August 12) I was walking back from the break room that is located outside of Small Pole. As I reached the Small Pole press, Edgar Lewis stopped me and asked if I had made a decision on signing the card in support of the Union. . . . The time period that this took place was approx. 1:25 to 1:35 p.m. (1325 to 1335). To my knowledge this took place after break, but I am not certain.
>
> On Friday (August 15) Laura Fontenot came into Small Pole around 2:45 p.m. . . . She said that she had told someone from Small Parts that she needed to ask me about some metal that had been cut. In actuality, she came down to Small Pole to ask me to sign for the Union. I told Laura no. She then asked why not and I proceeded to tell her that it's (Union) not needed here. . . . She said to sign the card and then when it came time to vote all that I had to do was vote no, if that is how I felt.
>
> In conclusion, I would like to state that these occurrences did not bother me personally. However, my concern is for the new employees that feel intimidated . . . .

Abney decided to discipline both Lewis and Fontenot on the basis of Hutchison's report. He conducted no further investigation. Since he was disciplining two employees, he prepared two separate statements. He prepared these statements in Hutchison's presence. Hutchison reviewed and signed each of them.

With regard to Lewis, the second statement reports the following:

> On Tuesday, August 12 . . . [a]t approximately 1:35 p.m., I was looking for Andy Hughes. . . . [B]reak period is from 1:30 p.m. to 1:40 p.m., so I went into the break room. . . . Once I left the break room, I walk[ed] to the hydraulic press located in the small pole production area. As I was standing in this area, Edgar Lewis approached me and asked me[,] "Have you decided to sign a union card yet[?]"

With regard to Fontenot, the second statement reports the following:

> On 8–12–97, I Lonny Hutchison was working a 10 hour shift. . . . At approximately 2:45 p.m., Laura Fontenot approached me in the small pole assembly area and asked me if I had a chance to think about signing a union card. I responded by telling Laura that I did not think a union was necessary at Valmont and that I was not going to sign a card. At this time, Andy Hughes approach[ed] the area. . . . She continued by stating that she told her leadman that she was coming to small pole to talk to me about some scrap steel, but she really wanted to ask me about signing a union card. … Laura continued by stating that she wanted me to go ahead and sign a union card and when it came time to vote the union in, I could mark no on the ballot.

There is no evidence that Abney questioned Hutchison regarding the discrepancies between the two statements, most notably the 3-day variation in the date regarding his conversation with Fontenot.

At the hearing, when testifying to these same events, Hutchison admitted that the conversation with Lewis took place in the aisle within 20 feet of the restroom, exactly where Lewis said it occurred. It did not take place in the small pole department. He was not performing any work at the time. Rather, he was looking for an employee who had gone on break. On direct examination he asserted that Lewis had twice previously spoken with him about signing a union card. On cross-examination he revised this testimony, stating that Lewis and Fontenot had each spoken with him once previously. With regard to Fontenot, Hutchison placed the conversation on August 12, the same day Lewis spoke to him, and continued to contend that Fontenot asked him to "act like we were talking about scrap" when Hughes approached. He also testified that, in addition to asking if he had signed a card, Fontenot actually asked him to sign a card, stating that he could still vote against the Union.

I do not credit any of Hutchison's varying accounts of his conversation with Fontenot. His demeanor was not impressive. His untruthful written report regarding the location of his conversation with Lewis and his ascribing different dates to his conversation with Fontenot cause me to question the reliability of his recollection of events. His testimony that he felt harassed by Lewis and Fontenot, which directly contradicts his written statement that "these occurrences did not bother me personally," leave me with little confidence in the truth of any matter he addressed. I do not credit his attribution of an ulterior motive to Fontenot, that "she came down to Small Pole to ask me to sign for the Union," using the excuse of asking about scrap metal. I credit Fontenot's credible denial that she asked Hutchison to make any misrepresentation. She told her leadman that she was going to the small pole department to see Hutchison about the scrap. That is what she did. After Hutchison stated that he would e-mail Ray, Fontenot asked Hutchison if he had signed a union card. Hutchison replied, "No." Fontenot said, "Great," and departed. Fontenot credibly denied any further conversation relating to union cards or the Union, including suggesting that he sign a card but then vote against the Union.

On August 19, Lewis was called to Foreman Gregg's office where Gregg, Bower, and Abney were present. Bower told Lewis that between 1:30 and 2 p.m. on August 12 he had been seen leaving his workstation to solicit for the Union. Lewis stated that he would not do this, that he had just been written up. Gregg noted that the alleged offense had occurred on the previous Tuesday, a week earlier. Lewis stated that he did not remember, then again asserted that he knew he would not do such a thing. Lewis was told he was being placed upon indefinite layoff while Respondent investigated. Lewis asked why, noting that they could go out and ask any of the people around his workstation. Bower said no. Lewis then asked who had seen him soliciting. No one responded.

On August 22, Lewis was called to the plant. This time only Bower and Abney were present. At the beginning of the meeting, Lewis requested a witness. Bower refused. He read off of the corrective action that he was holding, stating that Lewis had, on August 12, at approximately 1:30, "entered the Small Pole department, a working area of the plant, and begun a non-work-related conversation with another employee while that employee was on working time." He then asked Lewis what he remembered about August 12. Lewis stated that he had gone over that with them on August 19. Both Bower and Abney stated that the report had been confirmed. Lewis asked by whom, and Abney replied that was "not important." Lewis protested that it was important to him. Abney replied that they had to protect the identity of the person. Lewis was handed the

report and began reading it. When Lewis saw the reference to 1:30, he pointed out that 1:30 was breaktime. Abney stated that he was in a work area. Lewis stated that he did not agree with the action that Respondent was taking. It is undisputed that Lewis was never specifically advised of exactly what he was accused of having done or the identity of the other person involved.

On August 19, Fontenot was called to the office of her foreman, Jesse Aranda. Bower and Abney were also present. Bower read from the corrective action that had been prepared, stating that Fontenot was "outside of her workstation and soliciting an employee during working hours and in a working area." He then asked if she understood it. Fontenot replied, "No." Abney began explaining that solicitation meant she could not buy or sell. Fontenot stated that she did not sell anything, all she did was ask Hutchison a question, and pointed out that this was at 2:50, not 2:45, after the horn for clean up had sounded. Abney began stating the same thing, and Fontenot repeated that all she did was ask a question and she did not understand how that was solicitation. Abney mentioned that Fontenot had misrepresented why she was going to the small pole department, but he gave no further explanation regarding this. The written warning states that Fontenot misrepresented both her whereabouts and intentions. There is no evidence of Fontenot having received any prior discipline.

2. Analysis and concluding findings

Rules prohibiting solicitation during working time are presumptively valid. *Our Way*, 268 NLRB (1983). In the absence of evidence establishing justification for a greater restriction, a respondent may not restrict where solicitation occurs so long as it occurs on the employees' own time. In this case, as in *Cooper Tire & Rubber Co.*, 299 NLRB 942, 947 (1990), Respondent "has failed to demonstrate any substantial business or economic justification for extending its [no-solicitation] rule . . . to nonworking areas . . . used by employees on their nonworking time as [on] their way to the breakroom, smoking area, restroom, water fountains, or in and out of the plant."

Respondent argues that it had a "reasonably held good faith belief" that Lewis and Fontenot had solicited Hutchison in violation of its no-solicitation rule. The cases cited in support of this argument are factually distinguishable and inapposite. In *GHR Energy Corp.*, 294 NLRB 1011, 1013–1014 (1989), Respondent acted upon the belief in the truthfulness of one employee's identification of two employees who allegedly had been involved in a bottle throwing incident. Unlike the instant case, that respondent did not discharge the employees on the basis of inconsistent statements that bore no resemblance to the facts. Rather, the company official who discharged the two employees confronted the offending employees with the specific accusation. The second case cited by Respondent, *Lucky Stores*, 269 NLRB 942 (1984), involved a confidential employee with access to confidential labor relations information that the respondent was privileged to protect. It was undisputed that the confidential employee had signed a posting for a unit position. Furthermore, and more significantly, the employees in these two cases were not engaged in protected activity.

Employees who engage in union activities are not immune from nondiscriminatory discipline when they violate lawful plant rules unrelated to employee Section 7 rights. Respondent's assertion of a "reasonably held good faith belief" might well prove persuasive in circumstances involving misconduct disassociated from protected activities, but solicitation on behalf of a labor organization is an activity protected by Section 7 of the Act. When an employee is disciplined for an alleged violation of a lawful rule while engaging in activity protected by Section 7 of the Act, the employer is not privileged to act upon a reasonable belief if, in fact, the employee is innocent of any wrongdoing. *Ideal Dyeing & Finishing Co.*, 300 NLRB 303, 319 (1990). As the Supreme Court stated in *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), "A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." The burden of proof is upon the General Counsel to show that the employer's honest belief was mistaken, that the alleged misconduct did not in fact occur. The Board, in *Keco Industries*, 306 NLRB 15, 17 (1992), repeated longstanding precedent that, "[w]here an employee is disciplined for having engaged in misconduct in the course of union activity, the employer's honest belief that the activity was unprotected is not a defense if, in fact, the misconduct did not occur."

Respondent had two versions of Hutchison's report, one stating that the incident involving Lewis occurred between 1:25 and 1:35, the other stating that it occurred at 1:30. Despite this, Bower told Lewis that the incident occurred between 1:30 and 2, which includes 20 minutes of working time, from 1:40 until 2. Bower knew that Lewis was on break. Despite this, Bower did not specify that the alleged offense occurred shortly after break began; rather, he accused Lewis of leaving his work area to solicit for the Union. Lewis denied the accusation. He did not know what Bower was talking about.

Respondent discharged Lewis for engaging in solicitation after Lewis supposedly "entered the Small Pole department" and engaged in conversation with an employee who was on working time. Hutchison's report that he was at the press in small pole was a lie. Hutchison's admission that the short conversation with Lewis occurred in the aisle immediately adjacent to the restroom establishes that no violation of any rule took place.[6] Even assuming that the aisle between the small pole and large pole departments constituted a work area, the employees were on break. Although Hutchinson may not have considered himself to have been on break, there was certainly no way that Lewis, or anyone else, could have been aware of that fact. Hutchison was not working; he was wandering around the plant looking for a coworker who was on break. He did not inform Lewis that he was not on break. He had just left the breakroom and was in the aisle a few feet from the restroom door. Respondent's no-solicitation rule, as written, is a valid rule. It does not prohibit solicitation on nonworking time, even when that solicitation occurs in a work area. Bower's testimony at hearing establishes that he did not understand the rule since, so far as he was concerned, "solicitation cannot be in working areas." The conversation between Lewis and Hutchison occurred on breaktime. Hutchison, contrary to his statement, was not at a press. He was in an aisle next to the restroom. The General Counsel has established that Lewis did not engage in the conduct for which Respondent disciplined him. Respondent, by discharging Lewis for alleged violation of its valid no-solicitation rule, a violation that did not occur, violated Section 8(a)(3) of the Act.

Fontenot did not engage in solicitation. She did not ask Hutchison to sign a union card. She simply asked whether he had signed a union card. Bower, when asked whether an em-

[6] Respondent's brief does not acknowledge Hutchison's admission that the conversation occurred in the aisle next to the restroom.

ployee would be disciplined for asking if a coworker brought peanut butter for lunch, answered, "No." General Manager Roger Caldwell admitted that he did not consider asking whether a person had signed a union card to constitute solicitation. An employer may not restrict union-related conversation while permitting conversation relating to other topics. *Opryland Hotel*, 323 NLRB 723 (1997). Discipline imposed for such an invalid restriction constitutes a violation of the Act. Even assuming that cleanup time, when no production work was being performed, be considered working time, Fontenot's question did not constitute solicitation. Thus, the conduct for which Fontenot was warned, solicitation during working hours in a working area, did not occur. Respondent's warning of Fontenot for allegedly engaging in solicitation when, in fact, she had only asked a question of a fellow employee, violated Section 8(a)(3) of the Act.

E. The Allegation of Surveillance

Counsel for the General Counsel, in his brief, acknowledges that "the surveillance of a union meeting was not established." Notwithstanding the foregoing acknowledgement, the General Counsel has not moved to withdraw the allegation from the complaint. On August 20, between 4:30 and 5 p.m., the Union conducted a meeting in a conference room at a local motel. The record establishes, and I find, that, during this time period, Foreman David Wunderlich came to the office of the motel at the request of his stepdaughter, Cynthia Moehlman, who was employed as a desk clerk at the motel. Moehlman had requested that her stepfather pick up her credit card which he was to take to Radio Shack where he was to purchase a telephone that she had ordered. He did so. An invoice from Radio Shack reflects that the transaction was completed at 5:02 p.m. on August 20. The mere presence of a supervisor or management official at a location where union activity is taking place does not establish unlawful surveillance. "[W]here purely fortuitous circumstances bring such parties together there is no dogmatic legal principle by which the employer would be declared to have violated the Act." *Gossen Co.*, 254 NLRB 339, 353 (1981). Consistent with this principle, and in agreement with Counsel for the General Counsel, I find that the presence of Wunderlich at the motel at the time of the union meeting was coincidental. *Montgomery Ward & Co.*, 189 NLRB 80, 83 (1971). The record does not establish that Respondent unlawfully engaged in surveillance of a union meeting. I shall, therefore, recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. By issuing warnings to Edgar Lewis and Michael Sharp because of their support for, and activities on behalf of, the Union, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act

2. By prohibiting distribution of union literature in a nonworking area and solicitation on behalf of the Union on nonworking time in working areas and, pursuant to those prohibitions, issuing warnings to Grady Niemeyer and Laura Fontenot and suspending and discharging Edgar Lewis, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully warned employees, it must remove those warnings from the files of those employees. Pursuant to Respondent's policies, Michael Sharp and Laura Fontenot were precluded from posting for different jobs for a period of 6 months following the imposition of the written warnings that they received. The determination of whether this restriction had any adverse impact upon either of them shall be addressed at the compliance stage of this proceeding, and they shall be made whole if they were adversely affected.

The Respondent having discriminatorily discharged Edgar Lewis, it must offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Valmont Industries, Inc., Brenham, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning or otherwise discriminating against any employee for supporting United Steelworkers of America, AFL–CIO, CLC, or any other union.

(b) Prohibiting distribution of union literature in a nonworking area and solicitation on behalf of the Union on nonworking time in working area and, pursuant to those prohibitions, issuing warnings to employees and suspending and discharging employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Edgar Lewis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Edgar Lewis whole for any loss of earnings and other benefits suffered as a result of the unlawful discipline imposed upon him, with interest computed in the manner set forth in the remedy section of the decision.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from the files of Edgar Lewis, Michael Sharp, Grady Niemeyer, and Laura Fontenot the warnings issued to them, and make whole Michael Sharp and Laura Fontenot if the restriction against their posting had any effect upon them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Edgar Lewis and the unlawful warnings issued to Edgar Lewis, Michael Sharp, Grady Niemeyer, and Laura Fontenot, and within 3 days thereafter notify the employees in writing that this has been done and that the discipline will not be used against them in any way.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Brenham, Texas, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 1997.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[8] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT warn or otherwise discriminate against any of you for supporting United Steelworkers of America, AFL–CIO, CLC, or any other union.

WE WILL NOT prohibit you from distributing union literature in nonworking areas of the plant and soliciting on behalf of the Union on nonworking time in any area of the plant, and WE WILL NOT warn, suspend, or discharge you for engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Edgar Lewis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove the unlawful warnings issued to Edgar Lewis, Michael Sharp, Grady Niemeyer, and Laura Fontenot and WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to those unlawful warnings and the suspension and discharge of Edgar Lewis, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discipline will not be used against them in any way.

VALMONT INDUSTRIES, INC.